

Claimant asks for review of findings and conclusions relating to the nature and extent of disability and, in addition, argues that the Administrative Law Judge made certain errors in calculating the award. Specifically, claimant argues that the Administrative Law Judge failed to consider the opinion of Dr. Blake C. Veenis regarding claimant's loss of ability to perform tasks and made a mathematical error in calculating the wage-earning loss. Claimant also asserts that the Administrative Law Judge erroneously began the work

disability portion of the award on the date claimant returned to work rather than the earlier date that he was released to return and stopped receiving temporary total disability benefits. Claimant contends that the Administrative Law Judge improperly calculated the transition from work disability to functional disability. Finally, claimant argues that the Administrative Law Judge failed to consider the argument that the temporary total disability benefits were underpaid.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments made by the parties, the Appeals Board concludes that the finding by the Administrative Law Judge that claimant gave timely notice should be affirmed but that the award should be modified to one based upon a 40 percent permanent partial general work disability. The Appeals Board also finds that the award should be modified as to the date the work disability begins and that the calculation should be corrected as claimant suggests.

Claimant worked as a general laborer in shipping and receiving at Wal-Mart. His duties included pulling pallets out to the floor, unloading them and stocking shelves. In February 1994, claimant twisted his left ankle while unloading the back of a truck. He did not notify the employer because he did not feel the problem was severe. He went instead to the Veterans Administration Hospital where he was provided an ACE wrap. He did not return for further medical treatment.

On June 13, 1994, again while unloading a truck, claimant caught his feet on a pallet and several of the boxes fell down on him. Claimant fell to the floor and twisted both ankles. Following this accident claimant notified the assistant manager and completed an accident report.

Respondent acknowledges notice of the left ankle injury on June 13, 1994, but denies it received notice of a right ankle injury on that date or within ten days thereafter. In support of its argument respondent points to the initial report of injury which refers only to the left ankle and to the initial medical reports which also refer only to the left ankle.

While the Appeals Board agrees the claimant initially emphasized his left ankle, the Appeals Board nevertheless finds that claimant did satisfy statutory notice requirements. K.S.A. 44-520 requires that a claimant give notice of the accident within ten days. Respondent clearly had notice of an accident within ten days. In addition, the authorized treating physician, Dr. Joel T. Weigand, had notice that the claim was related to both ankles by June 21, 1994, less than ten days after the accident. For these reasons the Appeals Board agrees with and affirms the decision by the Administrative Law Judge finding timely notice.

The Appeals Board concludes, on the other hand, that the finding by the Administrative Law Judge relating to the nature and extent of claimant's disabilities should be modified. The Administrative Law Judge found that claimant has a 35.5 percent work disability and the Appeals Board concludes this should be modified to a finding of a 40 percent work disability.

Respondent challenges the initial finding that this claim involves a general body impairment. The Appeals Board agrees with the conclusion by the Administrative Law Judge that claimant injured both ankles. This conclusion is supported both by the claimant's testimony and that of the three physicians who testified in this case.

Respondent next contends that if a general body disability is awarded it should be limited to functional impairment. This argument is grounded in an assertion that claimant refused to return to work at a comparable wage. He did so, according to respondent, by

failing to provide respondent's physician release allowing him to do so. On that basis, respondent asks the Appeals Board to apply the principles announced in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 284 (1994), rev. denied 257 Kan. 1091 (1995). The Appeals Board finds the facts here to be materially different from those presented in Foulk. The Appeals Board concludes from the review of the record that claimant did not deliberately fail or refuse to provide the release. There may have been some confusion about how to read the release and whether it allowed claimant to work full time. The release by the treating doctor appears, in fact, to have been timely provided to Mr. Tracy.

Finally, respondent argues that the Administrative Law Judge failed to deduct from the award the amount of preexisting functional impairment as required by K.S.A. 44-501(c). Respondent bases this argument upon testimony by Dr. Steven J. Howell indicating that 20 percent of claimant's problem was related to his ankle injury and 80 percent related to a preexisting diabetic neuropathy. From our review of the record it appears the record does not support a finding of preexisting functional impairment to be deducted. Claimant did have a preexisting diabetic condition. The Appeals Board also finds that the diabetic condition made the injuries substantially worse than they might have been. The record shows, however, that claimant had not had ankle problems before approximately February of 1994. The diabetic condition was not, prior to these injuries, causing impairment in claimant's ankles. We do not view the testimony of Dr. Howell as testimony that 80 percent of the current functional impairment preexisted. He is, instead, testifying in his opinion that 20 percent of the cause was claimant's ankle injury and 80 percent was the preexisting diabetic condition. Respondent, in fact, acknowledges that there is no evidence in the record indicating the amount of preexisting functional impairment. Under these circumstances the Appeals Board finds, as indicated, that the record does not establish that claimant had a preexisting functional impairment to be deducted from the current award under K.S.A. 44-501(c).

Claimant's counsel also challenges the findings and conclusions relating to the nature and extent. He first asserts that the Administrative Law Judge ignored the task-loss opinion of Dr. Veenis. Dr. Veenis did initially agree with the opinion of Mr. Jerry D. Hardin that claimant had a 77 percent loss of ability to perform tasks. However, he also testified that the restrictions were basically restrictions on the amount of time that claimant spent standing and the amount of time that claimant spent sitting. He agreed that, using a time-weighted analysis, the loss would be 50 percent of claimant's ability to perform the tasks. The Appeals Board agrees with and adopts that opinion. The Appeals Board therefore concludes that claimant has, from the injuries involved in this claim, a 50 percent loss of ability to perform tasks.

The claimant also argues that the Administrative Law Judge made a mathematical error in computing the wage-loss component of the work disability. The Appeals Board agrees. The pre-injury wage was \$218.04 and the evidence establishes, for the period of work disability, a post-injury wage of \$150.53. This yields a 31 percent wage loss, not the 21 percent used by the Administrative Law Judge.

The statute in effect at the time of this injury required that the wage loss and task loss be given equal weight. K.S.A. 44-510e. Doing so yields a 40 percent work disability which the Appeals Board finds to be the disability sustained by the claimant as a result of the injuries in this claim and further finds to be the appropriate basis for the award of benefits.

Claimant also points out that the Administrative Law Judge erroneously started the work disability on May 25, 1995. This was the date claimant returned to work. The record shows, however, claimant was released January 17, 1995. The work disability should be calculated from and after January 17, 1995 and through December 8, 1995. Claimant is

entitled to a functional award of 4.5 percent of the body as a whole beginning December 9, 1995, the date claimant actually returned to a comparable wage position.

Claimant argues there are two additional errors in the calculation of the award. The first relates to the fact that the award changed from a work disability to a functional impairment. After reviewing the Award the Appeals Board agrees. The Administrative Law Judge failed to properly account for the weeks of work disability. The corrected version is stated in the award below.

Finally, claimant argues the Administrative Law Judge overlooked the underpayment of temporary total disability by \$5.26 per week for 24.85 weeks for a total of \$130.71. Although the issue was not discussed in the body of the opinion, the Administrative Law Judge did correct the underpayment in the "Award" section. The corrected version is incorporated in the award below.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated January 25, 1996 should be, and hereby is, modified.

Claimant is entitled to 24.85 weeks of temporary total disability at the rate of \$145.37 per week or \$3,612.44 followed by 46.43 weeks (January 18, 1995 through December 8, 1995) weeks for a 40 percent work disability at the rate of \$145.37 per week or \$6,749.53. At the time the disability converts to functional impairment (December 8, 1995), respondent will have paid more than would be paid for 4.5 percent functional impairment and as of December 8, 1995 respondent would therefore owe nothing further. The total award is 24.85 weeks of temporary total and 46.43 weeks for a 40 percent permanent partial work disability, all at \$145.37 per week in the total amount of \$10,361.97 which is all due and owing and should be paid in one lump sum less amounts previously paid.

The Appeals Board adopts all other orders made as a part of the award of the Administrative Law Judge.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David H. Farris, Wichita, KS  
Douglas C. Hobbs, Wichita, KS  
Office of Administrative Law Judge, Wichita, KS  
Philip S. Harness, Director